

understood that I am to pay them to you yourself." If Seah Jim Huat chose to accept the notes on this consideration there is nothing that I can see to prevent his being bound by it.

Seah Song Seah had no doubt good and sufficient reasons for the restriction he imposed e.g., he may very likely have foreseen that what has happened here, might happen and have desired to prevent it and in my opinion the word "personally" not only has the effect of making the note non-negotiable but also of preventing a valid assignment of the debt in respect of which the notes were given, such at all events appears to me to have been the intention of the parties at the time and as such should be given effect to. I ought not to omit to mention the case of *Brice v. Bannister*, (1878) 3 Q.B.D. page 580, to which Mr. Braddell drew my attention. In that case Brett, L.J., doubted whether a non-negotiable note could be assigned, there being an intention manifest on the instrument that it should not be transferable.

In the view that I take of Seah Jim Huat's right to assign there is no necessity to consider whether the assignment was absolute, but it was contended for the Plaintiff that the Defendants were estopped from disputing this claim for the reasons set out in paragraphs 3, 4 and 8 of the Reply and Defence to the Counterclaim and in support of this contention, some letters which passed between the Solicitors of Seah Song Seah, Seah Jim Huat, the Plaintiff and the Defendants and the Defendants' affidavit for the Collector of Stamps were put in.

It would appear from these documents that the first two Notes were satisfied and the affidavit filed before the Plaintiff took his assignment and it might be argued that the payment of these notes and the filing of the affidavit would estop the defendants from asserting that this debt was due at all. It would not have the effect of estopping them from asserting that the debt was not due to the Plaintiff nor can I see that the advice given by Mr. Emerson of the firm of Sisson & Delay to the Plaintiff that he might take the assignment assuming such advice were given, would estop the defendants, Sisson & Delay having been Solicitors for Seah Song Seah who died in December, 1910, and it now appearing that Messrs. Sisson & Delay were Solicitors for the Defendants.

For these reasons I am of opinion that the action must be dismissed and Judgment entered for the defendants. As for the counterclaim it follows from what I have said that the defendants may have a declaration that the notes are not assignable; but inasmuch as by the Memorandum of Agreement of the 3rd of April, 1911, the Plaintiff had been constituted the Attorney of

Seah Jim Huat to collect this debt there can be no order that the notes be retained in Court.

Judgment for Defendants with costs.
Solicitors for Plaintiff—*Braddell Bros.*
Solicitor for Defendants—*E. R. Koek (Sr.)*

[ORIGINAL CIVIL JURISDICTION]

HYNDMAN-JONES, C.J.

April 1, 1912.

[APPELLATE CIVIL JURISDICTION]

FISHER, EBDEN & SPROULE, JJ.

August 7, 1912.

TAN HOOD KENG.....Plaintiff (Appellant)

v.

A. R. P. AROONASALAM CHETTY

AND ANOR.....Defendant (Respondent)

[SINGAPORE SUIT No. 124 of 1911]

[SINGAPORE CIVIL APPEAL No. 22 of 1912]

Action for fraudulent representation—Mortgage—Consent order for redemption, effect of—Affirmation of transaction—Estoppel—Election to affirm mortgage.

In 1909 a mortgagor who had prior dealings with a money-lender on account current executed a mortgage to him to secure a definite sum of \$175,000 and interest (whereof \$173,916 was expressed to be then owing to the mortgagee). On the 30th July 1909 he applied by way of Originating Summons for an order for an account of the amount due under the mortgage and for redemption. In support of his application he filed an affidavit stating *inter alia* (1) that the mortgage has been signed on the faith of the mortgagee's representation that the latter would render him an account of the actual amount due at the date thereof, (2) that only \$50,000 or thereabouts was the actual amount owing by him on such date. On the 13th August 1909 an Order was made by consent for the relief claimed, in the common form for redemption. After various proceedings in the action (which included an order by consent for trial of certain issues as to the validity of the mortgage but which order was subsequently set aside as being made without jurisdiction) the Registrar certified the amount due to the mortgagee, on the footing of the validity of the mortgage. The mortgagor applied to vary the certificate but the same was refused. He then commenced an action to set aside the mortgage on the ground of the alleged fraudulent representation of the mortgagee to which the latter *inter alia* pleaded the redemption by way of estoppel:—

Held, that the acts of the mortgagor in applying for and obtaining the Order for redemption of the mortgage constituted a deliberate election on his part not to insist on his right to repudiate the mortgage on the ground of fraud and that he was bound by such election and that on the plea of estoppel the action must be dismissed.

Prior to the 4th July, 1906, Tan Hood Keng had various dealings with A. R. P. Aroonasalam Chitty and had executed equitable mortgages in the latter's favour to secure monies due on account current. On the 4th July, 1906, the said Tan Hood Keng executed a mortgage in favour of the Chitty to secure \$175,000 and interest the original mortgages being discharged. The deed stated that the said sum was made up of \$173,916 now owing by the mortgagor to the mortgagee

(as the mortgagor acknowledges) and of the sum of \$1,084 advanced to the mortgagor by the mortgagee (whereof the mortgagor acknowledges the receipt). At the time of the execution of the mortgage the mortgagor also signed an acknowledgment showing the various amounts making up the said sum of \$173,916 and that he had received the Promissory Notes and I.O.U's. in respect thereof.

On the 13th July, 1908, the said Chitty sub-mortgaged the property comprised in his mortgage to V. V. R. Somasundaram Chitty to secure \$150,000 and interest, notice whereof was given to the said Tan Hood Keng.

On the 30th July, 1909, the said Tan Hood Keng by his Solicitors took out an Originating Summons against the said Aroonasalam Chitty for an account under the Mortgage dated the 4th July, 1906, and for redemption. In support of such Summons he filed his affidavit stating *inter alia* (1) that the actual amount due at the date of the mortgage was \$50,000 or thereabouts (2) that the mortgage was signed on the faith of the said Chitty's promise to account for what was then actually due and to pay the difference between that amount and \$175,000 (3) that no accounts had been rendered nor had the original Promissory Notes been returned. On the 13th August, 1909, an Order by consent was made for the account, etc., in the common form for redemption.

On the 9th September, 1909, the said Defendant Chitty filed his account, starting with the item of \$175,000 stated in his mortgage, to which the Plaintiff filed surcharges and falsifications impeaching the validity of the mortgage and the correctness of the said amount.

On the 12th September, 1910, upon a reference by the Registrar, who had declined to enter into the question of the validity of the mortgage, an Order by consent was made upon the Defendant's application for the trial of certain issues of fact as to the validity of the mortgage, the consideration thereof, etc.

On the 31st October, 1910, an Order on the application of the Sub-mortgagee (V. V. R. Somasundaram Chitty) who had obtained leave to attend the proceedings was made discharging the said Order for the trial of the said issues on the ground of want of jurisdiction.

On the 11th February, 1911, the Registrar certified the sum of \$235,097.60 to be due on the Mortgage, and subsequently an application by the Plaintiff to vary the said Certificate was dismissed.

On the 8th March, 1911, the Plaintiff commenced the present action claiming to set aside the said Mortgage dated the 4th July, 1906, for fraud, etc., and in his Statement of Claim sub-

stantially repeated the allegations contained in his affidavit filed in the redemption action. The Sub-mortgagee was made a Defendant but the Plaintiff disclaimed any relief against him. The 1st Defendant denied the alleged fraud and *inter alia* pleaded that the Plaintiff was estopped by the Order of the 13th August, 1909.

On the 10th July, 1911, the Plaintiff having applied for inspection of the 1st Defendant's accounts anterior to the mortgage in question, an order was made under section 351 of the Civil Procedure Code for the prior determination of the pleas of limitation and estoppel, which had been set up by the said Defendant. On the hearing of the arguments thereon, the Plaintiff gave evidence as to the circumstances under which he signed the mortgage and issued the Originating Summons.

Page for the Plaintiff.

Koek (Senior) for the 1st Defendant.

Upcott for the 2nd Defendant took no part in the argument.

Cur. Ad. Vult.

HYNDMAN-JONES, C.J.—I am of opinion that the 1st Defendant succeeds on the point raised.

The case has come before me in its present shape by reason of an Order made by the Acting Chief Justice on the 10th July, 1911, which directed (I cite the words of the order) that "the question be first determined whether the Plaintiff's claim is barred by (1) Estoppel (2) Limitation Ordinance."

These pleas were raised in paragraphs 10 and 11 of the amended Statement of Defence of the 1st Defendant but on the hearing before me Mr. Koek abandoned his plea under "The Limitation of Suits Ordinance 1896" and his first two grounds of estoppel; and was content to rely on his third ground, viz:—that "on the 13th day of August, 1909, the Plaintiff in the action (Originating Summons 381, 1909, referred to in paragraph 8 of the Statement of Defence) applied for and obtained an order for an account of the amount due under and redemption of the said mortgage."

The question appears to turn upon whether the Plaintiff knew of the alleged fraud at the time when he applied for and obtained this order. I may say, parenthetically, the fraud is emphatically denied by the 1st Defendant in paragraph 6 of his Statement of Defence, for if the Plaintiff did know of the fraud and yet chose to proceed by Originating Summons to ask for and obtain an account under the mortgage on the ordinary footing, he must be taken to have made his election once and for all; it does not lie in his mouth to approbate the mortgage by asking for

an account under it, and afterwards to attack it as invalid on the ground of fraud.

Lord Blackburn in *Scarf v. Jardine*, L.R. 7 Appeal Cases 345, put the principle of law in this way: he said "when a party in his own mind has thought that he would choose one of two remedies and has communicated his determination to the other side in such a way as to lead the opposite party to believe that he has made that choice he has completed his election and can go no further; and, whether he intended it or not, if he has done an unequivocal act, i.e., an act which would be justified if he had elected one way and would not be justified if he had elected the other way the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

Now what is the fraud the Plaintiff alleges?

He says in paragraph 6 of his Statement of Claim of the 13th March, 1911, that on the 4th day of July, 1906, "the Plaintiff, not understanding that he was signing what purported to be a settled account, executed in favour of the said Defendant an acknowledgment and a mortgage over certain property therein specifically named to secure the repayment to the Defendant of a sum of \$175,000—together with interest thereon at 15% per annum"; he says that "he had not received more than one-fourth of the said sum of \$175,000, but that he executed the said acknowledgment and mortgage relying on the fraudulent representation of the said Defendant that an account should be forthwith drawn up and the difference between the said sum of \$175,000 and the amount actually owed by the Plaintiff should be paid to him": that the account has never been drawn up nor the difference paid.

With regard to the Plaintiff not understanding what the mortgage purported to be he (the Plaintiff) in giving evidence before me told his own Counsel that the mortgage was explained to him before he executed it, while with regard to the alleged stipulation that an account should be forthwith drawn up I interpret the word "forthwith" to mean "within a reasonable time," and having regard to the fact the 1st Defendant was a money lender by trade and kept the accounts and to the fact that the Plaintiff asserts that he had not received more than one-fourth of the \$175,000 I should suppose by his using the word "forthwith" that the Plaintiff intended that the accounts should be rendered as soon as possible—saying within a month or even less from the date on which the mortgage was executed.

Nevertheless according to the Plaintiff's evidence, if his evidence is to be believed, he went on through 1906, 1907, 1908 and part of 1909

constantly pressing the 1st Defendant to render these accounts and then in July, 1909, after consulting his then Solicitors he proceeded to affirm the mortgage by making the application by the Originating Summons No. 38 of 1909 already referred to.

To me it is incredible, if the Plaintiff only executed the mortgage on such a stipulation as to the accounts being rendered forthwith as he would have me believe, that he should not, long before he issued that summons, have come to a conclusion as to the Defendant's *mala fides*—a conclusion which he now says he came to only after the summons had been issued, the order obtained and the accounts gone into. I am therefore constrained to hold that, if fraud there were in withholding the accounts, the Plaintiff knew of it before he issued that summons.

Such being my view on the facts, the law as I have already stated is clear. A contract induced by fraud is voidable and not void; the party who is defrauded has a right on discovering the fraud to elect whether he will continue to treat the contract as binding or disaffirm it: but having once made his election he will be bound by it.

Moreover the election to disaffirm a contract on the ground of fraud should be prompt: action should be taken within a reasonable time (*In re Eastgate; Ex parte Ward*, L.R. (1905) 1 K.B. 465) and even supposing the Plaintiff were not hampered with the estoppel by the Originating Summons it would be a fair argument for the Defendant that the Plaintiff having allowed three years to go by without doing anything now came too late to induce the Court to believe that his story of the transaction was the one.

That however is not the question before me at present.

Either one of two things happened in July, 1909; the Plaintiff after consulting his Solicitors may have decided to treat the mortgage as a valid security on a settled account and so applied for and obtained the order he did in Originating Summons 38 of 1909; or, on the other hand, the Plaintiff may have misconceived the proceedings which he ought to have taken. In view of the pleadings and such evidence as had been placed before me the former seems to be not unlikely: but in the latter case, the Plaintiff's remedy if he had one would not be against the Defendant.

I have not been unmindful of the cases cited for the Plaintiff but they seem to me to be inapplicable to the circumstances of the case before us.

Brunsdon v. Humphrey, L.R. 14 Q.B.D. 141 decided that injuries to the person and injuries to property, being an infringement of separate rights give rise to separate causes of action and

the separate actions may be brought on each. I do not doubt that proposition.

In *Hunter v. Stewart*, 31 L.R. Ch. N.S. 348, Lord Westbury held that, the allegations in a former suit which has been brought in Sydney being different from the allegations in the latter suit brought in London and raising a different equity the decision in Sydney was not conclusive against the Plaintiff in the latter suit. So far as I can see that was a question of *res judicata* not a case in which the Plaintiff having a choice of two remedies selected one.

The case of *Law v. Law*, (1905) 1 Ch. 140, appears to me to enunciate the principles which apply to the present case, and I am of opinion that the Plaintiff's claim is barred by the estoppel raised.

Koek applied under section 328 of the Civil Procedure Code for the dismissal of the action with costs, on the ground that the decision on the point of law substantially disposed of the claim.

Page contra.

HYNDMAN-JONES, C.J., dismissed the action with costs.

The Plaintiff appealed from the judgment and the matter was heard on the 10th July, 1912. *C. I. Carver* for Plaintiff (Appellant).

Koek (Sr.) for 1st Defendant (Respondent).

A. K. a B. Terrell for 2nd Defendant took no part in the argument.

Cur. Ad. Vult.

On the 7th August, 1912, the Court of Appeal (Ebdon and Sproule. JJ., Fisher, J., dissenting) affirmed the said judgment and dismissed the appeal with costs.

FISHER, J.—There are certain aspects of this case to which I think sufficient attention has not been directed; and as they appear on the face of the memorandum of appeal and have some significance in their bearing on the conduct of the parties, I think they ought to be noticed.

Plaintiff on 30th July, 1909, as mortgagor, took out an Originating Summons against 1st Defendant as mortgagee (then the only Defendant and represented by Mr. Van Someren) to have an account taken of what "if anything" was due on a mortgage and to redeem the property mortgaged. His Summons was supported by an affidavit the contents of which can leave no possible doubt as to what he wanted and what he thought he could get, by this procedure. In paragraph 2 he asserts that the mortgage debt was less than 1/3rd of what is expressed in it: in paragraph 3 he states that he executed it on a promise by Defendant to go into accounts which should show what actually was due, and that Mr. Koek's clerk, Goh Chin Watt, heard the

promise made and undertook to see it carried out: in paragraph 4 he states that it has not been carried out: and he goes on to allege the sub-mortgage by Defendant to Somasundram Chetty (now 2nd Defendant) and also to allege that first Defendant has been collecting the rents of the houses, and the proceeds of sale of the sand from the sand pit, on the mortgaged land, and has not accounted to him.

On the hearing of the Summons a fortnight later the learned Chief Justice made an order by consent for the taking of an account of what was due under the mortgage, etc., and for reconveyance by Defendant on payment by Plaintiff of what was found due, and in default of payment, for dismissal of the action. There is nothing in the order which in any way suggests that any objection was raised by the 1st Defendant to the allegations contained in the Plaintiff's affidavit on the ground that there were matters not to be gone into on an Originating Summons, nor is there anything to show that the allegations were brought to the notice of the learned Chief Justice. An enquiry seems to have taken place under this consent order, at which the sub-mortgagee (now 2nd Defendant) got leave to attend, and was represented by Mr. Koek, and it appears that on the 4th August, 1910—a year later—the Registrar issued a certificate—which was not set out in the memorandum, but of which a copy was handed up by counsel during the argument.

This certificate is referred to in an order of 12th September, 1910, beginning "upon the application of the Defendant, for directions under the reference by the Registrar's certificate herein dated 4th August, 1910"—while a Summons of 26th October begins. "Let all parties..... appear..... on 28th October, 1910..... on the hearing of an application on the part of the Defendant, for directions under the reference by the Registrar by his certificate herein dated 4th August, 1910."

It therefore, appears that it was on the 1st Defendant's own application that the order of 12th September said to be "by consent," was made—and it ordered the trial of an issue on questions set out *seriatim*, which involved the question of fraud or undue influence in the obtaining of the mortgage, the question whether the consideration stated to have been received by Plaintiff ever was so received, the question whether the Defendant's accounts filed after the first order were fraudulent or incorrect, and the question whether the plaintiff was entitled to have the mortgage rectified; all of which are matters which he now claims in his action against the two Defendants. The Summons on which this order was made is not exhibited, but it is clear that it was taken out by Mr. Van Someren

on behalf of first Defendant and that the order on it was taken by consent as between Plaintiff and Defendant—the onus being put on Plaintiff by the order to prove his allegations. On the 21st October, 1910, a further order was made, this time on a Summons of the 13th October, taken out by Mr. Koek on behalf of the 2nd Defendant (then attending the proceedings by leave) to discharge the order of the 12th September, 1910, on two grounds 1st—want of jurisdiction—2nd the non-applicability of the provisions of section 380. The Summons was directed to Plaintiff and his Solicitors, and to the (1st) Defendant and his solicitor Mr. Van Someren and on the 21st October after hearing Counsel for all parties the order of 12th September was discharged—as Mr. Koek stated at the bar, because his client had not consented to it. Five days later (26th October) Mr. Van Someren for 1st Defendant appears to have taken out another Summons, directed to Plaintiff's Solicitors, and to Mr. Koek as Solicitor for "a party having liberty to attend proceedings" (present 2nd Defendant)—again for directions under the Registrar's reference of the 4th August—but I cannot find that any order was made on it. The Registrar's certificate of 11th February, 1911, gives the 31st October as the date of the order repeating the order of 13th August, 1909, and I suppose that was the order made on Mr. Van Someren's Summons—but I do not find any such order.

No doubt there was such an order. Probably it was made on Mr. Van Someren's Summons. But it is not before us. Now the reference by what is called the Registrar's certificate of the 4th August, 1910, makes it clear that at the enquiry Plaintiff's Solicitor proposed to cross-examine 1st Defendant on the *bona fides* of the mortgage: that Mr. Van Someren objected on the ground that that was outside the scope of the order: and that the Registrar referred the matter for the decision of a Judge. That is the reference on which Mr. Van Someren for 1st Defendant took out the Summons for directions, and on which the first Defendant consented to the order that was made, involving an enquiry into the charges of fraud, etc., which form the ground of Plaintiff's claim in the present action.

We have it therefore, that 1st Defendant while represented by Mr. Van Someren, not only never took any objection to the Plaintiff's claims to impeach the mortgage as fraudulent, or obtained by misrepresentation, on the ground that by seeking an account in the way he had sought it he had approbated the mortgage and therefore was estopped from attacking it, but that he actually took out a Summons by Mr. Van Someren for directions when the Registrar declined juris-

diction on which he consented to an order putting Plaintiff to the proof of exactly the same things as he now seeks to establish in his action to rectify the mortgage. The sub-mortgagee represented by Mr. Koek, got that order discharged on the ground (so far as we know, the only ground) that it had been made without his consent (it would be interesting to know if it was made without his knowledge—for it was made on a reference dated after the enquiry had been nearly a year on foot): and now, when Plaintiff sues Defendant for the same relief he claimed then, and joins the sub-mortgagee as 2nd Defendant, 1st Defendant abandoning Mr. Van Someren and being now represented by Mr. Koek, who no longer represents the 2nd Defendant succeeds in getting the action against both Defendants dismissed on the ground, that having (by the order he first got on his originating summons) "approbated" the mortgage, Plaintiff is estopped from attacking it in this action by setting up exactly what 1st Defendant consented to his setting up under an order obtained by himself, in the matter of an enquiry under that originating summons. Seeing that the order which has been discharged was made by the consent of Plaintiff and 1st defendant on a Summons taken out by the Defendant and not by the Plaintiff and seeing that Defendant was at that time represented by an advocate of such standing as Mr. Van Someren; seeing what the order that was consented to involved—an enquiry into the very matters (and much more) which the Registrar had held to be outside his jurisdiction on the original order; seeing that this consent order was of the 1st Defendant seeking or at any rate was procured on his, and not the Plaintiff's initiative; seeing that 2nd Defendant then only a party having leave to attend, got it discharged on the ground that it was not made with his consent: what sort of a position does the 1st Defendant now occupy when he comes forward to argue that Plaintiff is estopped from claiming in his present action to rectify or cancel the mortgage by attacking it on the various grounds of fraud and misrepresentation, because, the order he consented to and was instrumental in obtaining, which directed enquiry on those very points having been discharged because it was made without the consent of his sub-mortgagee, whom it was his business if anyone's to bring to the hearing of the Summons, the Plaintiff as the result of those manoeuvres, must be taken as having technically approbated the mortgage which it was all along his clear object to impeach?

I have no quarrel whatever with the law—a man cannot approbate and reprobate. If, having an appropriate remedy which he can put in force, he seeks, being ill-advised, one which is

inappropriate, and which not only cannot give him what he wants, but *prima facie*, puts him in the position of admitting that what he wants is what, in that way, he cannot have, he must take the consequences. But if, believing, as he makes clear by the affidavit he proceeds on that he did believe that he can get what he wants by means of that inappropriate remedy, he seeks that remedy, and as soon it appears that he is mistaken, his opponent, instead of setting up that his election of the wrong remedy bars him from the relief he seeks, because it involves an admission that the deed he seeks to impeach is one which he at any rate cannot impeach, because, on the procedure he has adopted, he must be taken to admit that it is unimpeachable, takes quite a different course and himself applies for and obtains an order, to which both parties consent, which gives Plaintiff exactly what he wants and what he believed he was entitled to, until Defendants' counsel succeeded in showing he was not, what is the position then? Can he be said to have approbated what he was attacking? In whose view did he approbate it? Surely not in the view of the other party to it, who helped him to get the very order which, if not discharged, would have enabled him to attack it? Yet that party now seeks to take advantage of the fact that the order has been discharged (because a third person, his own sub-mortgagee, was not brought in by him at the hearing of the Summons, and so did not consent to the order) and the original order for an account has been restored, to plead that the Plaintiff has been estopped by his election to proceed as he did, from bringing the present action, in which he seeks to do just what that same party put him in the position of being able to do in the very proceedings which he now says make such a course impossible.

Is this such an estoppel as that person can set up? It seems to me that if it is, odious is not too strong an epithet to apply to it. I should call it monstrous. "Estoppel" is, when "one is concluded and forbidden in law, to speak against his own act or deed, yea, though it be to say the truth." "Every estoppel because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference." "Estoppels are odious and the doctrine should never be applied without a necessity for it." (Bramwell, L.J., in *Baxendale v. Bennett*, L.R. 3 Q.B.D. p. 529). Sir George Jessel, M.R. (in *General Finance Co. v. Liberator Building Society*, L.R. 10 Ch. D. p. 15) said the doctrine should not be carried further than a judge was obliged to carry it for that it gave to falsehood the effect of truth.

In speaking of estoppel in *pais* or by representation, Lord Blackburn said: "I take it

that one common idea runs through the whole—namely, that your rights as between yourselves, must be regulated upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act." And in *Ex parte Adamson*, L.R. 8 Ch. D. p. 807 James, L.J., said:—"Nobody ought to be stopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he has said or done or omitted to say or do."

Now, what act or deed, "certain to every intent" has the Plaintiff done—what has he induced the Defendant to take, as the basis upon which he was to act—by what act, word, or neglect has he induced the Defendant to do, or to abstain from doing something which ought now to prevent him from speaking against what he said or did, so as to aver the truth and assert his demand, on the ground that his doing so would work a wrong to the Defendant because he has induced him to act on a basis which was not accurate?

Clearly, nothing. He elected an inappropriate procedure, and his affidavit must have disclosed to Defendants' counsel that he supposed he could get under it what he could not get. Under his Summons he got an order in consonance with the practice, and when at the enquiry he sought to go into matters outside the scope of it, defendant's counsel of course objected.

When the matter was referred to a judge, Defendant's counsel it was who applied for directions and Defendant consented to an order, on which Plaintiff got an enquiry outside the scope of the original order, and involving matters which could not be enquired into on it otherwise. It is not believable that Mr. Van Someren should have taken that course in ignorance of his client's rights on such a Summons, and it follows that Plaintiff by electing as he did, made no inducement whatever in consequence of which Defendant could be made subject to the working of any wrong, and also that he never could for a moment have believed that by getting the first order he got Plaintiff was "approbating" the mortgage he got leave to attack under the second—for he was himself the means of his getting the second. It is not Mr. Van Someren who comes to raise this plea. Clearly, as his action shows, he was concerned that his client should "face the music." When the third party got the order discharged, he appeared to have issued another Summons on which the original order was restored—that I suppose he could not well avoid in his clients' interest. And then when

the Plaintiff sues both Defendants and impedes the mortgage, his client goes elsewhere and raises this plea: which rests on the assumption that he did not know or understand the significance of the order he had consented to, and had been deceived by the nature of the procedure adopted into the belief that the Plaintiff desired to approbate and not to reprobate the mortgage. That is a position I am quite unable to accept. If the estoppel set up operates now, why did it not operate to prevent the making of the consent order? There is only one answer;—the defendant at the time, on Mr. Van Someren's advice did not consider such a course open to him as to raise it—because he knew perfectly well that Plaintiff was not approbating but attacking the deed. And if he knew that then, how can he set up the contrary now, because someone else has got the order he consented to, discharged? It seems to me that it would be much more equitable to apply the doctrine of estoppel to him, and to say that it is a plea which his own conduct ought to estop him from pleading. The order in appeal, holding Plaintiff to be estopped was made on the ground, as I read the judgment, that he had done "an unequivocal act," which would be justified if he had elected one way, but not if he elected the other way and having done that *to the knowledge of the persons concerned*, had made his election, and was bound by it.

In my opinion, more than that is necessary; the very words of the Judgment from which the proposition is taken show that in order to be bound he must communicate his determination to the other side, in such a way as to lead the opposite party *to believe* that he has made that choice. I cannot conceive what he is alleged to have done to lead the 1st Defendant to *believe* that he, by adopting this mistaken procedure, had elected to approbate the mortgage. I cannot understand how, in the face of the consent order, Defendant could possibly be heard to say that he ever did believe anything of the kind. I do not wish to use language which is in any way inappropriate to a judgment of this Court, but it does seem to me that the Plaintiff has been jockeyed out of the position which first defendant knowingly and of his counsel's advice assisted him to get into, because, having now repented him of his former view, or having been converted by his sub-mortgagee to his present attitude, 1st Defendant has gone back on his expressed consent, and now sets up the case—as he must—that *he never knew, what, on Mr. Van Someren's advice, he consented to*. At the trial of the issue, Mr. Koek did not call him as a witness, to say so. If Mr. Van Someren were still his counsel, could he possibly have raised the defence that he had been deluded into a false belief? He would not have dared—so he goes to another

counsel, calls no evidence, and relies on a mere technicality which depends for its success on an assumption which is not only not justified, but which cannot be true.

I think the order in appeal dismissing the action should be set aside, and that the action, as against both Defendants, should proceed. I think the appellant is entitled to the costs, both of the appeal, and of the trial in the Court below, as against the 1st Defendant, but as regards the 2nd Defendant who took no part in the appeal, and whose costs in the Court below were reserved, there should be no order as to costs until judgment in the action, when they may be dealt with.

EBDEN, J.—In face of the acknowledgment of indebtedness and of the Statutory Mortgage both executed by the Plaintiff Appellant on the 4th July, 1906, the story set out in the Statement of Claim, if true, amounts to a tale of amazing folly on Appellant's part.

All however that we are directly concerned with is the issue of estoppel as decided by the learned Chief Justice in his judgment under appeal. Appellant says in his Statement of Claim that he executed these instruments relying on the fraudulent representation of first Defendant that an account should be forthwith drawn up and the difference between the sum of \$175,000 named in the mortgage and the sum actually owing by Appellant should be paid to the latter. He waited three years and then took out his originating summons of 30th July, 1909. He supported the summons by Affidavit of the same date in which he asserted that his debt at the date of the mortgage was only \$50,000 or thereabouts and that he had signed on strength of a promise by Defendant to go into accounts. On this summons the decree of 13th August, 1909, was made. That is the decree which Appellant sought and by which he was bound.

It has been argued for Appellant that election is a matter of intention and this is very true but the question here is whether the intention which we are asked to infer from the affidavit can be allowed to override that which is indicated by the application in the summons and by the acceptance of the decree. I think that the question is to be answered in the negative.

Appellant may have been badly advised as to the proceedings which he took. Or he may have been well advised. It may well have been supposed that it would be difficult to get over the terms of his acknowledgment and mortgage of 4th July, 1906.

I think that the only real argument for Appellant lies in the order made by consent on 12th September, 1910.

On the 3rd August, 1910—after change of Solicitors—Appellant's Solicitor proposed to examine first Defendant before the Registrar as

to the *bona fides* of the mortgage with a view to falsifying it. This was objected to, and the point was referred to the Chief Justice in chambers with the result that the order of 12th September, 1910, was made by consent of first Defendant.

This order sufficed to open up the enquiry which Appellant seeks in the present suit, but it was discharged on summons by Second Defendant, after adjournment into Court, on 31st October, 1910. The next proceeding appears to have been the issue of writ in the present suit.

First Defendant, like Plaintiff, has changed Solicitors and has raised the question of estoppel instead of abiding by his former consent to the investigation of the issue of fraud. This change of front on his part has not a nice appearance. There may however have been cause for it. We are not in a position to say. He may have had objections to cross-examination in open Court as to matters on which he would have been ready to answer in the Registrar's office. Again he may have been under pressure by Second Defendant who got the order of 12th September, 1910, discharged. The fact remains that he is within his rights as the Order of 12th September, 1910, to which he consented was discharged.

Consequently we are thrown back on the decree of 13th August, 1909, on which I think that Appellant must be held to have made his election.

I think therefore that the Appeal should be dismissed with costs to Respondent.

SPROULE, J.—The Plaintiff mortgaged lands to the 1st Defendant, who sub-mortgaged his security to the 2nd defendant. The plaintiff thought he had been defrauded. Various remedies were open to him. Among other things, he might have brought an action, as in the present suit, alleging fraud and praying for cancellation (or rectification) of the mortgage. Or he might conceivably have decided to make the best of a bad bargain, affirm the mortgage, pay that was due on that basis, and so redeem the security. The advantage of the latter course would be the quick and cheap procedure the law provides—by the machinery of an Originating Summons a resort not open to him if he desired to challenge and fight the alleged fraud.

The plaintiff elected to proceed uncontroversially by Originating Summons in 1909. He filed an affidavit in support, however, challenging the amount of the consideration stated in the mortgage-deed. The affidavit was dated 30th July, 1909. The usual decree for accounts and redemption was made by consent on 13th August, 1909.

That decree was a final judgment. In the account to ensue, the correctness of the amount of the consideration as stated in the deed could not be questioned, so that upon this head the

account was purely formal. Up to the date of the decree, therefore, the Plaintiff might have had a *locus poenitentiae* he might have had proceedings stayed, and resorted to another remedy. The decree, however, set the seal of the Court upon the Plaintiff's election to affirm the mortgage by proceeding uncontroversially, and while the decree stood, it bound him, in my opinion, irrevocably.

The decree might have been set aside by consent. As a matter of fact, something approaching such reversal very nearly occurred, and in the following manner. Before the Registrar the Plaintiff attempted to falsify the amount of the consideration. The Registrar refused to allow this, but agreed to refer the question to the Court, which he did by his order of 4th August, 1910. Upon that reference the learned Chief Justice on 12th September, 1910, made an order by consent for the trial of an issue to decide whether the plaintiff's allegations of fraud (or undue influence) were true. That in short, was the substance of the issue.

Whether the order so made was regular or not, the 1st defendant consented to forego legal rights (now the subject of this appeal) in an honest and straightforward desire to vindicate his challenged good faith. The present 2nd defendant, intervened in defence of his security and succeeded in getting the order of 12th September, 1910, reversed for want of jurisdiction.

The Registrar then proceeded with the formal accounts, and on 11th February, 1911, made a certificate in the usual form. On 8th March, 1911, the plaintiff issued the writ in the present suit, alleging fraud and praying for cancellation of the mortgage. The defence raised, among other pleas, one of estoppel by election. A preliminary issue was tried and the suit of 1911 was dismissed out of Court on this plea. The plaintiff now appeals from that finding and order.

He cites before us a number of authorities to show that election is question of intention. Accepting that hypothesis, how does it apply to the facts of this case? Mr. Carver cites the affidavit of 30th July, 1909, to show that the plaintiff from the first never intended to affirm the mortgage, but to challenge it. But the Plaintiff actually issued an Originating Summons that day for accounts and redemption. It is very clear to me how we should construe his apparently inconsistent conduct. The affidavit shews what he might have desired to do, the Summons is what (no doubt under bad advice) he actually did, and what we must hold he intended to do, namely, to approbate the mortgage by proceeding uncontroversially.

Then, we are referred to the attempted falsification before the Registrar of the amount of the consideration in the deed. Mr. Carver agrees that the Registrar, in an account of that

nature, had no power to admit such an attempt, but relies upon it as shewing the plaintiff's intention not to affirm the mortgage. Regretfully, however, I think we can only deduce a belated and futile attempt to revoke a binding election already made. Lastly we are referred to the consent order of 12th September, 1910. If that order had not been wiped off the record by its reversal, there might have been such acquiescence on record against the 1st defendant as might have put him out of Court in this Appeal. He has changed his mind since the date of that order and now takes advantage of his sub-mortgagee's intervention to raise this plea of estoppel. His conduct is sharp, and his consent in September, 1910, was more honest and more admirable. But I know of no legal reason why he should not change his mind and rest upon his legal rights. The decree of 13th August, 1909, remains of full force and effect, and governs and colours all subsequent proceedings under the Originating Summons. It renders the plaintiff's subsequent intention to revoke his election, nugatory, by being belated. It has the effect, further, of so clouding his subsequent actions, as to prevent any clear deduction as to intention: at one and the same time by reason of the unreversed decree plaintiff is made to continue to approbate, while, by his subsequent conduct, he seeks to reprobate, the mortgage. Now can you deduce intention from circumstances so contradictory?

I am regretfully aware that if the decision of the Court below be upheld, the plaintiff suffers great hardship. His remedy, however, does not seem to be against the respondent. Mr. Koek, moreover, contends that it is still open to the Plaintiff to claim damages in an action of deceit, but we are not called upon to make any ruling upon this point. In my opinion, the plaintiff made election, and is now estopped in the present suit, and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Plaintiff—*Allen & Gledhill.*

Solicitors for the 1st Defendant—*Koek & Knowles.*

Solicitors for the 2nd Defendant—*Drew & Napier.*

Solicitors for the Plaintiff (Appellant)—*Donaldson & Burkinshaw.*

Solicitors for the 1st Defendant (Respondent)—*Koek & Knowles.*

Solicitors for the 2nd Defendant—*Drew & Napier.*

[APPELLATE CIVIL JURISDICTION]

WHITLEY, J.

March 9, 1931.

S. V. S. MUTHURAMAN CHETTIAR,

Etc.....Plaintiffs
(Appellant)

vs.

E. KONG GUAN & Anor., Etc.....Defendants
(Respondents)

[MALACCA CIVIL SUIT No. 36 of 1925]

Practice—Appeal—Refusal of appellant to pay costs ordered to be paid by him—Vexatious proceeding—Ground for stay—Further security for costs—Civil Procedure Code, Ss. 1129, 1150.

The Court has power to make an order for security for unpaid costs and to stay further proceedings in default whenever it appears that a party is proceeding vexatiously in not paying costs which he has been ordered to pay.

The grounds on which further security for costs of a pending appeal will be ordered discussed.

Motions heard before Whitley, J. sitting as a single Judge under Section 1150 of the Civil Procedure Code.

The 1st and 2nd Defendants (respondents) filed two Motions respectively dated the 23rd and 24th of February, 1931. In the first Motion the 1st defendant asked *inter alia* for an order staying all further proceedings in the action until after the plaintiff (appellant) had paid to him or into Court the amount of taxed costs directed to be paid by plaintiff to this defendant under a Judgment dated the 14th of November, 1930, or until after the plaintiff had provided security in that amount and (2) further security for costs of the pending appeal. In the second Motion the 2nd defendant applied for an order directing plaintiff to pay into Court the amount of taxed costs awarded to him in the action or to furnish security for that amount and, in default, for an order dismissing the appeal filed by the plaintiff-appellant and further that the appellant be directed to increase the security for costs of the appeal from \$250 to \$6,000. Both Motions were supported by affidavits sworn to by the respective defendants which disclosed the following facts:—

1. The plaintiff had not paid the taxed costs of the two defendants under the Judgment of the 14th of November, 1930.

2. The plaintiff sued as the administrator *de bonis non* of the Estate of S. V. S. Supramaniam Chetty deceased. Neither